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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 31

[TD 9649]

RIN 1545-BI21

Section 3504 Agent Employment Tax Liability

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to agents authorized by the Secretary under section 3504 of the Internal Revenue Code to perform acts required of employers who are home care service recipients. The final regulations affect employers and their designated agents who pay wages for home care services, which are subject to taxes under the Federal Unemployment Tax Act. The final regulations also modify the existing regulations under section 3504 to be consistent with the organizational structure of the Internal Revenue Service (IRS), and to update the citation to the Internal Revenue Code of 1986.

DATES: Effective Date: These regulations are effective on **[INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**.

Applicability Date: For dates of applicability, see §31.3504-1(c) of these regulations.

FOR FURTHER INFORMATION CONTACT: Michelle R. Weigelt at (202) 622-0047 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to 26 CFR part 31 under section 3504 of the Internal Revenue Code (Code). On January 13, 2010, the Treasury Department and the IRS published a notice of proposed rulemaking (REG-137036-08, 75 FR 1735, 2010-6 I.R.B. 398) (the proposed regulations) in the **Federal Register** under section 3504 of the Code. The Treasury Department and the IRS did not hold a public hearing because there were no requests to speak at a hearing. The Treasury Department and the IRS received written and electronic comments responding to the proposed regulations. After consideration of all the comments, the proposed regulations are adopted as amended by this Treasury decision. The comments and revisions are discussed in the preamble.

Explanation of Provisions

In case a fiduciary, agent, or other person has the control, receipt, custody, or disposal of, or pays the wages of an employee or group of employees, employed by one or more employers, section 3504 of the Code authorizes the Secretary of the Treasury to promulgate regulations to authorize the person (“agent”) to perform certain specified acts required of employers. Under section 3504, all provisions of law (including penalties) applicable with respect to employers are applicable to the agent and remain applicable to the employer. Accordingly, both the agent and employer are liable for the

employment taxes and penalties associated with the employer's employment tax obligations which the agent is authorized to perform. Prior to the amendments made by these final regulations, §31.3504-1 of the Employment Tax Regulations provided that the IRS may authorize an agent to undertake the employment tax obligations of an employer with respect to income tax withholding and Federal Insurance Contributions Act (FICA) taxes. However, the employer was required to continue to meet its employment tax obligations with respect to Federal Unemployment Tax Act (FUTA) tax. Like the proposed regulations, these final regulations provide that the IRS may authorize an agent to undertake the employment tax obligations of an employer with respect to FUTA tax in certain circumstances.

Summary of Comments and Explanation of Revisions

A. Amendments to §31.3504-1(a)

Under §31.3504-1(a), an employer may request that the IRS authorize an agent under section 3504 to report, file, and pay income tax withholding, tax under the FICA, or tax under the Railroad Retirement Tax Act (RRTA), with respect to wages or compensation. The proposed regulations under §31.3504-1(a) proposed amendments to the existing regulatory language designed to update citations and be consistent with the current organizational structure of the IRS.

One commenter expressed concern that deletion of the limiting language “in respect of such acts” from these regulations implied an agent could be held liable for all of an employer's employment tax liabilities, regardless of which acts

the agent was authorized to perform. Under section 3504, the agent is only liable for acts the IRS has authorized the agent to perform on behalf of the employer. Thus, language that limits the scope of the agent's liability has been reincorporated into the final regulations.

Another commenter suggested that the final regulations include a rule that the agent is only liable for employment taxes with respect to wages or compensation paid by the agent on behalf of the employer. Because section 3504 provides an agent may also be authorized under section 3504 if the person has the control, receipt, custody, or disposal of the wages of an employer's employees, a rule that the agent can only be held liable for employment taxes with respect to those wages paid by the agent would be more narrow than the statute. Therefore, this rule was not adopted in the final regulations. In addition to the change to proposed §31.3504-1(a) made in response to comments, these final regulations adopt minor changes for clarity and consistency.

B. Amendments under §31.3504-1(b)

The proposed regulations under §31.3504-1(b) provide a special rule that allows an employer who is a home care service recipient to request that the IRS authorize an agent to act with respect to FUTA taxes imposed on wages paid for home care services, provided that the agent is authorized to act for the home care service recipient for income tax withholding and FICA tax purposes. The proposed regulations under §31.3504-1(b) do not apply to an agent that is authorized to report, file, and pay income tax withholding or FICA tax for an

employer who is not a home care service recipient, or for wages paid for services other than home care services.

Several commenters sought legal or procedural explanations which were beyond the scope of the proposed regulations. Thus, those comments are not addressed in these final regulations. For example, these regulations do not address comments seeking clarification on the identity of the common law employer if the home care service recipient has a representative acting on his or her behalf, the ability of an agent to delegate its responsibility to a third-party, the application of certain exceptions to FICA and FUTA taxes, the proper use of employer identification numbers (EIN) in filing employment tax returns, and the deposit requirements of agents. However, Revenue Procedure 2013-39, which is being released simultaneously with these final regulations updates the procedures for requesting that the IRS authorize a person to act as agent under section 3504, and addresses filing, reporting, and deposit rules for agents.

1. Certification of State Unemployment Contributions

Section 3504 provides that all provisions of law applicable to an employer apply to the agent. Thus, an agent authorized under the proposed regulations for FUTA tax purposes reports the state unemployment contributions paid into a state unemployment fund on behalf of a home care service recipient as a credit under section 3302 against the FUTA tax reported on the agent's aggregate FUTA tax return. The IRS has designated Form 940, Employer's Annual Federal Unemployment Tax (FUTA) Return, as the return to file to report FUTA tax. The credit can be reported by the agent regardless of whether the state

unemployment contributions are made under the name and state identifying number of the home care service recipient or of the agent.

Several commenters expressed concern that the IRS will be unable to verify the state unemployment contributions made on behalf of a home care service recipient if such contributions are reported on an aggregate Form 940 FUTA tax return using the agent's name and EIN. The commenters suggested that each home care service recipient's name and EIN be included on the aggregate return for purposes of the annual certification process.

Following the publication of the proposed regulations, the IRS issued Schedule R (Form 940), Allocation Schedule for Aggregate Form 940 Filers, for use beginning in tax year 2010. Agents of home care service recipients are required to use Schedule R (Form 940) to allocate the information reported on the aggregate FUTA tax return, and must separately list each home care service recipient's name and EIN on Schedule R (Form 940). Because the issuance of Schedule R (Form 940) resolves the concerns raised by these commenters, no changes were made to the final regulations.

2. Domestic Service Employment Tax Rules and Home Care Services

The proposed regulations define *home care services* to include health care and personal attendant care services rendered in the home care service recipient's home or local community. Several commenters requested clarification of whether home care services constitute domestic services for employment tax purposes, particularly when the services involve travel outside the home.

The Code has special rules for domestic services. These special rules include provisions in section 3401(a)(3) regarding the requirement to withhold income tax; sections 3121(a)(7)(B), 3306(a)(3), and 3306(c)(2) regarding minimum dollar thresholds for imposition of FICA and FUTA taxes; section 3121(b)(3)(B) regarding exemption from FICA tax for certain family employment relationships; and section 3121(b)(21) regarding exemption from FICA tax depending on the age of the service provider. Whether any of these rules apply in a given situation depends on whether the services are “domestic services” and whether the services are provided in the “private home” of the employer. These terms are explained in §§31.3121(a)(7)-1(a)(2), 31.3306(c)(2)-1, and 31.3401(a)-3 of the regulations.

Generally, §31.3121(a)(7)-1(a)(2) provides that domestic services are services of a household nature performed by an employee in or about a private home of the person by whom the employee is employed. A private home is a fixed place of abode of an individual or family. Sections 31.3306(c)(2)-1 and 31.3401(a)-3 contain similar descriptions for FUTA tax and income tax withholding purposes, respectively.

The preamble to the proposed regulations stated that services provided outside the home care service recipient’s private home may qualify as home care services for purposes of these regulations even if the services do not qualify as domestic service in a private home of the employer for purposes of sections 3121(a)(7), 3306(c)(2), and 3401(a)(3).

One commenter requested a rule deeming the special statutory rules for domestic services as applying to all home care services. The determination of whether the statutory rules for domestic services apply depends on whether the services are domestic services provided in the private home of the employer as explained in the regulations. Thus, a bright line rule that home care services are domestic services in all cases is beyond the scope of these regulations, and the proposal was not adopted.

However, we anticipate that there will only be limited circumstances when home care services would not be subject to the domestic service rules and note that the regulations on domestic service described in this section, and other public guidance currently available address these comments. For example, Revenue Ruling 56-109, 1956-1 CB 467, provides that services performed by an employee as a companion to a convalescent employer, including accompanying the convalescent on trips, constitute domestic service in a private home of the employer for purposes of employment taxes.

Several commenters interpreted the use of the phrase “home or local community” in the definition of home care services to impose geographical restrictions. The phrase was intended to indicate that despite the home-based nature of health care and personal attendant care services, home care services may be provided outside of a home, and was not intended to exclude services qualifying for funds under the government program based on the location at which the services were provided. Thus, home care services under the regulations include any services for which an individual enrolled in a government

program described in the regulations would be eligible to receive funds. Similar to how Rev. Rul. 56-109 describes a situation where services that are provided outside the employer's house nevertheless constitute "domestic services *in the private home* of the employer," services provided outside the home or local community may constitute home care services. Nevertheless, to avoid the implication of a geographical limitation on what services may qualify as home care services, the phrase was removed from the definition of home care services in the final regulations

Finally, one commenter interpreted the definition of home care services to include only services provided to elderly individuals and individuals with physical disabilities, and not to include services provided to individuals with intellectual and developmental disabilities. The definition of home care services in the proposed regulations are not limited by the type of disability. Rather, the definition of home care services includes any services for which an individual enrolled in a government program described in the regulations would be eligible to receive funds. Therefore, no changes were made to the final regulations with regard to the definition of home care services to address this comment.

3. Clarification Regarding Home Care Service Recipients

The proposed regulations define *home care service recipient* as any individual who receives home care services while enrolled, and for the remainder of the calendar year after ceasing to be enrolled, in a program administered by a Federal, state, or local government agency that provides Federal, state, or local government funds, to pay, in whole or in part, for the home care services for that

individual. Several commenters submitted questions regarding this definition that did not require changes to the regulations, but with respect to which clarification is provided in this preamble.

With regard to the Federal, state, or local government programs which provide funds for home care services, the preamble to the proposed regulations provides, “In all such programs, intermediaries who are engaged to assist beneficiaries to receive and distribute funds on the beneficiaries’ behalf are reviewed and approved by a state or local government agency.” Several commenters interpreted this statement as inferring coordination between the IRS and the Centers for Medicare and Medicaid Services (CMS) regarding qualifications and contracting requirements for agents. The statement was intended to highlight the currently existing oversight of the intermediaries that serve as agents in these programs by CMS or other Federal, state, and local government agencies. There is no anticipated IRS involvement in the way these agencies administer these programs, including selection and monitoring of the intermediaries.

Application of the proposed regulations requires that a home care service recipient be enrolled in a program that provides Federal, state, or local government funds to pay for home care services, *in whole or in part*. One commenter asked whether an individual who pays for home care services from his or her personal bank account or with other non-government funds can be a home care service recipient within the meaning of the regulations. An individual is not a home care service recipient within the meaning of these regulations if no

government funds are used to pay for any part of the home care services performed for the individual. However, an individual may be a home care service recipient if the cost of the home care services are initially paid for with non-government funds and such cost is reimbursed in whole or in part with government funds provided under the government program.

Other commenters asked about procedures an agent should follow when an individual ceases to be a home care service recipient. Under §31.3504-1(b)(3), a participant qualifies as a home care service recipient until the end of the calendar year in which the participant ceases to be enrolled in the government program; accordingly, the agent may act as an agent with respect to the home care service recipient's FUTA tax obligations for the entire calendar year in which the participant ceases to qualify as a home care service recipient. Furthermore, the agent may continue to act as an agent with respect to the home care service recipient's FICA tax and income tax withholding obligations pursuant to §31.3504-1(a) after a participant ceases to qualify as a home care service recipient. Treasury and the IRS do not believe a description of any specific procedures is needed in these regulations with regard to the cessation of home care service recipient status for FUTA tax purposes. However, Revenue Procedure 2013-39, which is being released simultaneously with these final regulations updates the procedures to request the IRS authorize a person to act as agent under section 3504 and clarifies the rules for revoking authorization.

Special Analyses

It has been determined that this Treasury decision is not a significant

regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to this regulation. Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. The collection of information contained in these regulations is a voluntary written application from an employer, signed by the employer and the agent, requesting the IRS approve the appointment of an agent to perform the acts required of the employer. The application contains information generally available to taxpayers, such as the name, address, and EIN of the employer, and ultimately serves to lessen taxpayer burden by allowing the employer to have an agent fulfill certain employment tax obligations.

Accordingly, a regulatory flexibility analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the proposed regulations preceding these regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business, and no comments were received.

Drafting Information

The principal author of these final regulations is Michelle R. Weigelt, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, personnel from other offices of the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 31

Employment taxes, Income taxes, Penalties, Pensions, Reporting and recordkeeping requirements, Railroad retirement, Social security, Unemployment compensation.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 31 is amended as follows:

PART 31--EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT SOURCE

Paragraph 1. The authority citation for part 31 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par.2. Section 31.3504-1 is revised to read as follows:

§31.3504-1 Designation of agent by application.

(a) In general. In the event wages as defined in chapter 21 or 24 of the Internal Revenue Code (Code), or compensation as defined in chapter 22 of the Code, of an employee or group of employees, employed by one or more employers, is paid by a fiduciary, agent, or other person ("agent"), or if that agent has the control, receipt, custody, or disposal of (collectively "pays") wages or compensation, the Internal Revenue Service may, subject to the terms and conditions as it deems proper, authorize that agent to perform the acts required of the employer or employers under those provisions of the Code and the regulations that apply, for purposes of the taxes imposed by the chapter or chapters, with respect to wages or compensation paid by the agent. If the agent is authorized by the Internal Revenue Service to perform such acts, all provisions

of law (including penalties) and of the regulations applicable to an employer with respect to such acts shall be applicable to the agent. However, each employer for whom the agent acts shall remain subject to all provisions of law (including penalties) and of the regulations applicable to an employer with respect to such acts. Any application to authorize an agent to perform such acts, signed by the agent and the employer, shall be made on the form prescribed by the Internal Revenue Service and shall be filed with the Internal Revenue Service as prescribed in the instructions to the form and other applicable guidance.

(b) Special rule for home care service recipients. (1) In general. In the event an agent is authorized pursuant to paragraph (a) of this section to perform the acts required of an employer under chapters 21 or 24 on behalf of one or more home care service recipients, as defined in paragraph (b)(3) of this section, the Internal Revenue Service may authorize that agent to perform the acts as are required of employers for purposes of the tax imposed by chapter 23 of the Code with respect to wages paid by the agent for home care services, as defined in paragraph (b)(2) of this section, rendered to the home care service recipient. If the agent is authorized by the Internal Revenue Service to perform such acts, all provisions of law (including penalties) and of the regulations applicable to an employer in respect of such acts shall be applicable to the agent. However, each employer for whom the agent acts shall remain subject to all provisions of law (including penalties) and of the regulations applicable to an employer with respect to such acts.

(2) Home care services. For purposes of this section, the term home care services includes health care and personal attendant care services rendered to the home care service recipient.

(3) Home care service recipient. For purposes of this section, the term home care service recipient means any individual who receives home care services, as defined in paragraph (b)(2) of this section, while enrolled, and for the remainder of the calendar year after ceasing to be enrolled, in a program administered by a Federal, state, or local government agency that provides Federal, state, or local government funds, to pay, in whole or in part, for home care services for that individual.

(c) Effective/applicability dates. An authorization under paragraph (a) in effect prior to **[INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]** continues to be in effect after that date. Paragraph (b) of this section applies to wages paid on or after January 1, 2014. However, pursuant to section 7805(b), taxpayers may rely on paragraph (b) of this section for all taxable years for which a valid designation is in effect under paragraph (a) of this section.

Beth Tucker

Deputy Commissioner for Services and Enforcement.

Approved: September 27, 2013

Mark J. Mazur

Assistant Secretary of the Treasury (Tax Policy).

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